In the Court of Appeals of the State of Alaska

Korakanh Phornsavanh, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-12499** **Order** Date of Order: **12/03/2021**

Trial Court Case No. **3AN-13-06468CR**

Before: Allard, Chief Judge, and Harbison, Judge and Suddock, Senior Superior Court Judge.*

Korakanh Phornsavanh was convicted, following a jury trial, of first-degree murder for the shooting death of Said Beshirov. Following his conviction, Phornsavanh continued to maintain his innocence, and he moved for a new trial under Criminal Rule 33, arguing that the jury's verdict was against the weight of the evidence and that a new trial was required "in the interest of justice." The trial court denied the motion for a new trial under an incorrect legal standard. On appeal, we vacated the trial court's order denying the motion for a new trial and remanded the case for reconsideration of Phornsavanh's new trial motion under the correct legal standard.[1]

On remand, the parties filed lengthy and comprehensive pleadings outlining their views of the evidence. Phornsavanh's pleading was sixty-seven pages and included stills from the cell phone video that showed the seconds immediately preceding and immediately after the shooting. The State's pleading was fourteen pages. Both

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* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

1 *Phornsavanh v. State*, 481 P.3d 1145, 1160-61 (Alaska App. 2021).

pleadings were focused on the correct legal question — whether allowing the jury's verdict to stand would constitute a miscarriage of justice.[2]

In addition to the parties' pleadings, the trial court held an hour-long oral argument on the motion. The oral argument has been transcribed and is part of the record on review.

After reviewing the pleadings and holding oral argument, the trial court issued a five-page written order granting Phornsavanh's motion for a new trial in the interest of justice. The State filed a motion for reconsideration. After a second round of briefing, the trial court issued a written order denying the motion for reconsideration. In the order, the court explained that it had based its decision to grant a new trial on the "full record of this case, including this court's contemporaneous observations of the witnesses and evidence when they were presented at trial, its recent review of the testimony and evidence presented at trial, and its review of the written and oral arguments presented by counsel on remand and on reconsideration." The court also noted that it "respects the time and effort the parties and jury spent on this case and recognizes the seriousness of the decision before it."

When we remanded the case to the trial court to reconsider the new trial motion, we retained jurisdiction. The case therefore returned to this Court following the trial court's decision on the new trial motion, even though the granting of a new trial

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[2] *See id.* at 1159 (requiring the trial court to "use its discretion to determine whether a verdict is against the weight of the evidence — not merely whether the trial court disagrees with the verdict — and whether a new trial is necessary 'in the interest of justice,' that is, 'to prevent injustice.'") (quoting *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 447 (Alaska 2015)); *see also Kava v. American Honda Motor Co., Inc.*, 48 P.3d 1170, 1177 (Alaska 2002).

motion is generally not considered a "final" order that the State can appeal.[3] (The State may, however, file a petition for review challenging the granting of a new trial motion.[4])

Upon the return of jurisdiction to this Court, we ordered both parties to provide supplemental briefing addressing the trial court's order granting the motion for a new trial in the interest of justice. In his briefing, Phornsavanh asserts that we should treat the State's supplemental briefing as a petition for review, and he argues that we should summarily deny the petition for review without exercising our discretionary authority to hear the State's challenges to the trial court's order. Given the procedural posture of this case, and the importance of the legal issues at stake, we conclude that we should exercise our discretionary authority to hear the State's challenges and address them on their merits.

As both parties agree, a trial court's ruling on a motion for a new trial based on the weight of the evidence is reviewed for an abuse of discretion.[5] Typically, under this standard, an appellate court will reverse a trial court order only if "the [trial] court's decision was 'clearly untenable or unreasonable.'"[6]

In its supplemental briefing, the State argues that a different standard of appellate review should apply to a trial court's decision to *grant* a motion for a new trial based on the weight of the evidence than applies to a trial court's decision to *deny* such

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[3] *See State v. Walker*, 887 P.2d 971, 973-74 (Alaska App. 1994).

[4] *See id.* at 976.

[5] *Phornsavanh*, 481 P.3d at 1159 (citing *Hunter*, 364 P.3d at 448).

[6] *Booth v. State*, 251 P.3d 369, 372 (Alaska App. 2011) (quoting *Gonzales v. State*, 691 P.2d 285, 286 (Alaska App. 1984)).

a motion. Because the granting of a motion for a new trial means the vacating of a jury verdict, the State argues that a "more stringent" and "more rigorous" standard of abuse of discretion appellate review should apply. In support of this argument, the State cites to several federal civil cases and one state criminal case.[7]

In response, Phornsavanh points out that these cases are in tension with Alaska Supreme Court cases that have repeatedly held that "the grant or refusal of a motion for a new trial rests in the sound discretion of the trial court," and that an appellate court "will not disturb a trial court's decision on such a motion except in exceptional circumstances to prevent a miscarriage of justice."[8]

In any case, it is not clear what a "more stringent" and "more rigorous" abuse of discretion standard of review necessarily means in this context. Nor is there any reason to believe that using such a standard would yield a different outcome in this case. The primary concern of the courts that use such a standard appears to be that a trial court not wholly usurp a jury's fact-finding.[9] But this concern is already addressed through

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[7] *See Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960); *Hutchinson v. Stuckey*, 952 F.2d 1418, 1420-21 (D.C. Cir. 1992); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995); *State v. Spinale*, 937 A.2d 938, 947 (2007).

[8] *Bylers Alaska Wilderness Adventures Inc. v. City of Kodiak*, 197 P.3d 199, 205 (Alaska 2008) (quoting *Reeves v. Alyeska Pipeline Serv. Co.*, 56 P.3d 660, 668 (Alaska 2002)); *Kava v. American Honda Motor Co. Inc.*, 48 P.3d 1170, 1173 (Alaska 2002).

[9] *See, e.g., Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (applying more stringent appellate review but also recognizing that "[T]he judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not.").

the standard the trial court is required to employ when deciding the motion for a new trial in the first instance.

As we explained in *Phornsavanh*, when a trial court rules on a motion for a new trial based on the weight of the evidence, the trial court must take a "personal view of the evidence" and "exercise its discretion and independently weigh the evidence."[10] The trial court must then "use its discretion to determine whether a verdict is against the weight of the evidence — not merely whether the trial court disagrees with the verdict — and whether a new trial is necessary 'in the interest of justice,' that is, 'to prevent injustice.'"[11]

In other words, the critical question is not whether the trial court merely disagrees with the jury's verdict; rather it is whether the trial court believes that the verdict is unjust.[12] As we emphasized in *Phornsavanh*, a jury's verdict is not to be overturned lightly.[13] A trial court should grant a motion for a new trial only in "exceptional circumstances," such as when there is "a real concern that an innocent person may have been convicted."[14] As the Second Circuit explained, "[i]t is only when

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[10] *Phornsavanh*, 481 P.3d at 1159 (internal quotations omitted) (quoting *Hunter*, 364 P.3d at 447); *see also Kava*, 48 P.3d at 1177.

[11] *Phornsavanh*, 481 P.3d at 1159 (quoting *Hunter*, 364 P.3d at 448).

[12] *See* 11 Mary Kay Kane, *Wright & Miller Fed. Prac. & Proc. Civ.* § 2806 (3d ed. 2021) (noting that a trial judge "does not sit to approve miscarriages of justice").

[13] *Phornsavanh*, 481 P.3d at 1158 (citing *Hunter,* 364 P.3d at 448).

[14] *Phornsavanh*, 481 P.3d at 1159 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)); *see also United States v. Brennan*, 326 F.3d 176, 189 (3d Cir.
(continued...)

it appears that an injustice has been done that there is a need for a new trial 'in the interest of justice.'"[15]

Here, the trial court made clear that it understood the extreme seriousness of what it was doing when it granted the motion for a new trial, and its order reflects that it did not come to this decision lightly. The trial court noted the importance of "honoring and respecting the jury's deliberative process and verdict," but ultimately concluded that allowing the verdict to stand would be unjust. There is nothing unreasonable or untenable in this conclusion given the evidentiary deficiencies in the State's case.

On appeal, the State argues that it presented "compelling evidence" of Phornsavanh's guilt. But the State ignores that there is also "compelling evidence" that suggests Phornsavanh is innocent. After viewing and listening to the trial testimony, the trial court clearly believes that there is a "real concern" that Phornsavanh is innocent and that a second trial with a different jury is therefore required in the interest of justice.[16]

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[14] (...continued)
2003) (noting that new trial in criminal case should be granted "only if [the trial court] believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted."); *United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990), amending 902 F.2d 604 (7th Cir. 1990) (clarifying that "[i]f the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial").

[15] *Sanchez*, 969 F.2d at 1414.

[16] *See id.*; *see also Phornsavanh*, 481 P.3d at 1159 ("It is indisputable that a primary goal, perhaps the paramount goal, of the criminal justice system is to protect the innocent accused against erroneous conviction.")(internal citations omitted).

As an appellate court, we are not in a position to second-guess that considered judgment based only on the cold record currently before us.

> In *Hunter v. Philip Morris USA Inc.*, the Alaska Supreme Court stated:
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> We commit [the new trial] determination to trial courts' sound discretion based on our trust in their position, expertise, and humility. History has indicated that this trust is well deserved. . . . Experience has shown that there is little cause for concern about trial courts ordering new trials too frequently: Such orders are a distinct exception.[17]

The trial judge in the present case is an experienced criminal judge who has presided over criminal jury trials for more than twenty-five years. There is nothing rash or ill-considered about the trial judge's order granting the new trial, and it is clear that his conscience demanded that he take this extraordinary step.

Moreover, granting a new trial does not mean that the State has lost its opportunity to try Phornsavanh for this crime. The State may still retry Phornsavanh with the same or different evidence, and a new jury will deliberate on Phornsavanh's guilt.[18] As the United States Supreme Court recognized in *Tibbs v. Florida*, the reversal of a conviction based on the weight of the evidence does not implicate the double

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[17] *Hunter*, 364 P.3d at 448.

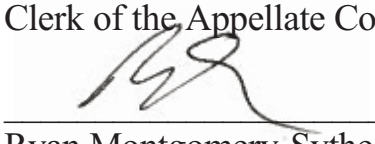
[18] *See United States v. Alston*, 974 F.2d 1206, 1212 (9th Cir. 1992) ("[B]ecause an order directing a new trial leaves the final decision in the hands of the jury, it does not usurp the jury's function in the way a judgment of acquittal does."); *see also Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 196 (4th Cir. 1987) (reaffirming that trial court's authority to grant new trial "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right") (quoting *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 352-353 (4th Cir. 1941)).

jeopardy clause and a retrial may provide greater clarity and an increased confidence in whatever verdict is finally reached.[19]

Accordingly, for the reasons explained in this order, we GRANT the State's petition for review of the trial court's order granting a new trial and we AFFIRM the judgment of the trial court.

Entered at the direction of the Court.

Clerk of the Appellate Courts



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[19] *Tibbs v. Fla.*, 457 U.S. 31, 42-44, 43 n.18 (1982) (rejecting notion that retrial requires new evidence and noting that "[a]lthough reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not.").